# STATE OF MICHIGAN

# COURT OF APPEALS

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FRANK GLANCY and BEVERLY GLANCY,

Plaintiffs-Appellants,

v

SAINT JOSEPH MERCY HOSPITAL,

Defendant-Appellee.

UNPUBLISHED
February 1, 2000

No. 212687
Washtenaw Circuit Court
LC No. 97-004378-NH

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Before: O'Connell, P.J., and Talbot and Zahra, JJ.

O'CONNELL, P.J. (dissenting).

I respectfully dissent. I conclude that *VandenBerg v VandenBerg*, 231 Mich App 497; 586 NW2d 570 (1998), and *Scarsella v Pollak*, 232 Mich App 61; 591 NW2d 257 (1998), are irreconcilable. Accordingly, I believe that *VandenBerg*, being the earlier of the two cases, must be followed in this case. Moreover, I believe that *VandenBerg* represents a sounder approach to the requirement that an affidavit of merit must be filed with a medical malpractice complaint. MCL 600.2912d(1); MSA 27A.2912(4)(1). *Scarsella* seems to consider the requirement jurisdictional, concluding that a complaint filed without the affidavit does not commence the lawsuit. *Scarsella*, *supra* at 64. I believe that the requirement is more akin to notice, and *VandenBerg* sets forth an appropriate analysis to determine whether the purposes behind the requirement have been satisfied in a given case. Because the purposes behind the requirement were met in this case, I would reverse the trial court's order granting defendant's motion for summary disposition.

A civil action is commenced and the statute of limitations is tolled when a complaint is filed. MCR 2.101(B); MCL 600.5856; MSA 27A.5856. However, in a medical malpractice action, the plaintiff must file an affidavit of merit with the complaint. MCL 600.2912d(1); MSA 27A.2912(4)(1). The affidavit must be signed by a health professional who meets the expert-witness requirements of MCL 600.2169; MSA 27A.2169, and must state the applicable standard of care and the witness' opinion whether that standard was breached. In essence, this affidavit "is a qualified health professional's opinion that the plaintiff has a valid malpractice claim." *Scarsella*, *supra* at 62-63.

The parties do not dispute that the complaint was filed without the required affidavit of merit. However, an affidavit of merit was filed with a prior complaint that was dismissed because it was

prematurely filed. That affidavit was served on defendant. The issue before this Court is whether, under these circumstances, summary disposition was an appropriate remedy for failure to comply with the affidavit requirement. I conclude that it was not.

The purpose behind the affidavit requirement is to deter frivolous medical malpractice claims. *Dorris v Detroit Osteopathic Hospital Corp*, 460 Mich 26, 47; 594 NW2d 455 (1999); *VandenBerg*, *supra* at 502. In *VandenBerg*, the plaintiffs filed the complaint in a medical malpractice action without the required affidavit of merit, but served the defendant with both the complaint and the affidavit of merit. The *VandenBerg* Court held that the purpose of the statutory requirement was fulfilled because defendants were served with the affidavit along with the complaint. The Court also held that the statute did not mandate dismissal for noncompliance, and that dismissal was too harsh a sanction where the purpose of the statute had been fulfilled. The Court noted that, while the statutory requirement of an affidavit of merit was mandatory, the statute "does not indicate the action may not be commenced without the affidavit." *Id*. at 502.

In contrast, a different panel of this Court held, one month later, that "for statute of limitations purposes in a medical malpractice case, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit." *Scarsella*, *supra* at 64. In *Scarsella*, the plaintiff filed the complaint just before the expiration of the two-year limitations period. No affidavit of merit was filed with the court or served on defendant. The *Scarsella* Court agreed with the trial court's analysis that the filing of the complaint was a "nullity" because it was unaccompanied by an affidavit of merit. Therefore, the action was not commenced and the statute of limitations was not tolled. The Court affirmed the trial court's grant of summary disposition to defendant because the limitations period had expired before a complaint *with an affidavit of merit* was filed.

The *Scarsella* Court attempted to distinguish *VandenBerg* in a footnote on the basis that "*VandenBerg* did not involve a statute of limitations problem and hence is factually and legally distinguishable from this case." *Id*. at 64 n 1. However, the two decisions are incompatible. The *VandenBerg* Court allowed an action to be commenced without the filing of an affidavit of merit and held that dismissal was not an appropriate remedy where the purposes of the requirement were served. The *Scarsella* Court held that the filing of a complaint without the required affidavit is a "nullity" that is insufficient to commence the action or toll the statute of limitations. The conflict between these two decisions has created confusion regarding whether dismissal is the appropriate sanction for failure to comply with the affidavit-of-merit requirement.[1]

MCR 7.215(H)(1) provides that a published opinion of the Court of Appeals issued on or after November 1, 1990 is binding precedent on other panels of this Court.[2] Where two published opinions conflict and both were issued after November 1, 1990, this Court must follow the first opinion that addresses the issue in conflict. *Novak v Nationwide Mutual Ins Co*, 235 Mich App 675, 690; 599 NW2d 546 (1999); *People v Young*, 212 Mich App 630, 639; 538 NW2d 456 (1995), remanded on other grounds 453 Mich 976 (1996). Therefore, this Court is required to follow *VandenBerg* to the extent that it conflicts with *Scarsella*. Accordingly, I would hold that an action for medical malpractice is commenced by the filing of a complaint, even without the required affidavit of merit. *VandenBerg*, *supra* at 502. Also, where the purposes of the requirement are served, dismissal is not an appropriate

sanction for failing to fully comply with the statutory requirement of filing an affidavit of merit with the complaint. *Id*. at 502-503. In reaching these conclusions, I expressly follow *VandenBerg* instead of the holding from *Scarsella* that the filing of a complaint without the affidavit of merit does not commence a medical malpractice action. *Scarsella*, *supra* at 64.

In *VandenBerg*, the defendant was served with the affidavit *simultaneously* with the complaint. In the instant case, defendant was served with the affidavit *before* being served with the complaint. The purpose of the affidavit requirement was clearly served. A qualified health professional offered an opinion of the merits of the claim, thus preventing the filing of a frivolous action. Also, defendant was provided with notice of the merits of the claim. Under these circumstances, dismissal was inappropriate.

To hold otherwise would be to make the filing of an affidavit of merit a *jurisdictional* requirement that must be met before the action is truly commenced. I believe that we should reject such a view, and conclude that the affidavit requirement is akin to notice—the affidavit is not required to commence the action, but it must be filed and served in order to provide the defendant with notice of the merits of the action.[3] MCR 2.101(B) provides that a civil action is commenced by filing a complaint. MCR 2.112(L) provides that, in medical malpractice actions, the plaintiff *must* file an affidavit as required by statute. However, this rule does not expressly abrogate or even supplement the general rule contained in MCR 2.101(B). Likewise, MCL 600.5856; MSA 27A.5856 provides that the statute of limitations is generally tolled by the filing of a complaint, yet MCL 600.2912d; MSA 27A.2912(4), which requires the filing of an affidavit of merit with the complaint in a medical malpractice action, does not expressly alter the requirement to toll the statute of limitations or commence the action. If the Legislature had intended to abrogate or supplement the necessary steps to commence an action or toll the statute of limitations, it would have clearly done so. We "must not judicially legislate by adding into a statute provisions that the Legislature did not include." *In re Wayne Co Prosecutor*, 232 Mich App 482, 486; 591 NW2d 359 (1998).

I stress that I am not concluding that dismissal is always inappropriate for the failure to file an affidavit of merit with a medical malpractice complaint. I would merely hold that, under the circumstances of this case, dismissal was too harsh a sanction. Indeed, our Supreme Court has held that dismissal without prejudice was an appropriate sanction where no affidavit of merit was *ever* filed or served. *Dorris*, *supra* at 47. In this case, however, an affidavit was filed in a previous action and served on defendant. The circumstances of this case are similar to those in *VandenBerg*, where the defendant had a copy of the affidavit when served with the complaint. That the limitations period expired before the affidavit was filed in the instant case does not alter our analysis. Plaintiffs' action was commenced, and the statute of limitations tolled, when the complaint was filed. To the extent that *Scarsella* would require us to hold otherwise, I believe that we are bound to follow *VandenBerg* because it precedes *Scarsella* and was issued after November 1, 1990. Therefore, I would reverse the trial court's decision to grant defendant's motion for summary disposition.

/s/ Peter D. O'Connell

[1] I note the following example of the confusion created by these conflicting decisions. On October 29, 1999, two panels of this Court, on the same day, reached opposite results in similar cases. See *Christy*

*v Detroit Osteopathic Hospital Corp*, unpublished opinion per curiam of the Court of Appeals, issued 10/29/1999 (Docket No. 205827), and *Shenduk v Harper Hospital*, unpublished opinion per curiam of the Court of Appeals, issued 10/29/1999 (Docket Nos. 199547 and 200389). In *Christy*, the plaintiff filed an affidavit of merit with the complaint, but the affidavit was from a physician that did not qualify as an expert witness under MCL 600.2169; MSA 27A.2169. The panel held that, although the plaintiff had not fully complied with the affidavit requirement, dismissal was not appropriate. The panel relied on *VandenBerg* in holding that dismissal was not a mandatory sanction for failure to comply with the affidavit requirement. The panel held that the plaintiff had indeed filed an affidavit of merit, thus properly commencing the action. Therefore, the trial court's denial of the defendant's motion for summary disposition was affirmed.

In *Shenduk*, a different panel affirmed the trial court's grant of summary disposition to the defendants because the plaintiff failed to file an affidavit of merit that complied with the statutory requirements before the limitation periods had expired. As in *Christy*, the plaintiff had filed an affidavit with the complaint, but the affidavit was not signed by a physician who met the statutory expert-witness qualifications. The majority concluded that the complaint was therefore properly dismissed. Judge Murphy, dissenting in part, noted that under *VandenBerg*, the technical noncompliance with the statute did not merit dismissal because the statutory purpose was served. The plaintiff, as in *Christy*, had filed an affidavit with the complaint; however, the affidavit was technically deficient. Judge Murphy also noted that the analyses of *VandenBerg* and *Scarsella* appear contradictory. Nonetheless, the majority affirmed the dismissal of the plaintiff's complaint. Therefore, on the same day, this Court reached opposite conclusions in two factually similar cases—a result precipitated by this Court's conflicting decisions in *VandenBerg* and *Scarsella*.

[2] This court rule supersedes Administrative Order No. 1994-4 and specifically provides as follows:

> A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule. [MCR 2.715(H)(1).]

[3] I note that, if the requirement is considered jurisdictional, then a great number of medical malpractice actions may be declared invalid in this state. Before our Supreme Court's decision in *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999), the bench and bar of this state operated under the belief (now mistaken) that the expert-witness qualifications of MCL 600.2169; MSA 27A.2169 were unconstitutional. Since the affidavit of merit must be from a qualified expert witness, presumably any affidavits filed by witnesses who do not meet the statutory qualifications are void, rendering the complaint ineffective to commence the lawsuit. I do not believe that such a result is warranted under the case law, nor that it would be sound jurisprudence.